STATE OF MICHIGAN

COURT OF APPEALS

LOVINA HUFFMAN,

Plaintiff-Appellee,

v

CITY OF MARLETTE,

Defendant-Appellant.

UNPUBLISHED
September 19, 2006

No. 260283
Sanilac Circuit Court
LC No. 04-029658-CZ

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant, City of Marlette, appeals as of right an the order of the trial court denying its motion for summary disposition on the ground of governmental immunity in this constitutional takings action. Plaintiff, Lovina Huffman, filed suit seeking damages on a claim of inverse condemnation. Because plaintiff has alleged that her property is permanently subjected to intermittent but inevitable runoff caused by defendant's improvement of the street in front of her home, she has properly pleaded a taking by inverse condemnation in avoidance of governmental immunity, and we affirm.

I

Plaintiff's home is located on E. Marlette Street in Marlette, Michigan. Defendant renovated E. Marlette Street including installation of a concrete curb and gutter, storm water sewers, and elevation and repaving of the surface of the road. Plaintiff alleges that defendant's renovation increased the ground water that flowed into her home. She states specifically that the manner in which defendant performed the renovations channeled water runoff into her home's foundation. Plaintiff claims that the water funneled into her dwelling created an accumulation of toxic black mold that made her ill, and rendered her home completely unlivable.

Plaintiff alleged in her first amended complaint that she is entitled to recover for a constitutional taking that "occurred when Plaintiff was left with no use or enjoyment of her home [because of] . . . water damage and the presence of black mold." In response, defendant filed a motion for summary disposition based on government immunity. Defendant specifically relied on the holding in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004) and argued that it should be governmentally immune from liability because its actions in renovating the street were not intentional and deliberate, and not specifically directed toward plaintiff's property. Finding that defendant's interpretation of *Hinojosa* "more restrictive than

the decision itself and that *Hinojosa* does not preclude the cause of action," the trial court denied defendant's motion. It is from this order that defendant now appeals.

II

This Court reviews a trial court's order on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). A party is entitled to summary disposition under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . immunity granted by law . . . ." MCR 2.116(C)(7). A motion brought pursuant to MCR 2.116(C)(7) requires consideration of all documentary evidence presented by the parties. *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). "A party may support such a motion by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "Unlike a motion under subsection [MCR2.116](C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." *Id.* "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. The motion is properly granted when, accepting as true all of the plaintiff's well-pleaded allegations, no factual development could provide a basis for recovery. *Atkinson v Detroit*, 222 Mich App 7, 12; 564 NW2d 473 (1997). The issue of whether an entity is entitled to governmental immunity is a question of law for this Court. *Baker v Waste Management*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

III

Government agencies are granted broad tort immunity by MCL 691.1407(1), which provides as follows:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a government function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

A plaintiff suing a government agency must plead a claim in avoidance of government immunity. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002).

Michigan's constitutional provision regarding takings claims reads as follows:

> Private property shall not be taken for a public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2]

A governmental taking may occur through formal condemnation proceedings or by inverse condemnation. *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991). "[A]n action that constitutes an unconstitutional taking may not be limited except as provided by the Constitution . . . ." *Hinojosa, supra* at 546. Accordingly, governmental immunity is not

applicable to a takings claim. *Id.*, at 546-547. To prove a taking by inverse condemnation, a plaintiff must prove two things: (1) that the government's actions were a substantial cause of the property's decline in value and (2) that "'the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.'" *Hinojosa, supra* at 548-549, quoting *Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979).

At issue here is the second factor. Defendant maintains that plaintiff's takings claim is barred under the reasoning of *Hinojosa* because plaintiff cannot show that defendant intended to impact plaintiff's property when it allegedly caused a water runoff to flow onto plaintiff's property. In particular, it is defendant's position that governmental action is not a taking if it is not intentional and deliberate, not specifically directed toward a plaintiff's property, and does not have the effect of permanently limiting use of the property. But defendant improperly injects an "intent" element into the *Hinojosa* test. In fact, in its brief on appeal, defendant disingenuously--and tellingly without jump citations--cites, *Heinrich, supra,* and *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994) for the proposition that "[t]here must . . . be some intentional and deliberate action by the government specifically directed toward the plaintiff's property that has the effect of limiting its use." Neither *Heinrich* nor *Peterman* require a plaintiff in an inverse condemnation action to establish "intent" on the part of the government actor.

Instead, the applicable law stands for the proposition that a plaintiff in an inverse condemnation action must show action directed at the plaintiff's property in order to establish the claim. *Hinojosa, supra; Heinrich, supra.* The Court in *Heinrich* observed that a plaintiff in an inverse condemnation action "appears" to have the burden of "establish[ing] the government abused its legitimate powers in affirmative actions directly aimed at . . . plaintiff's property." *Heinrich, supra* at 700. This Court has also stated that in inverse condemnation actions, "generally speaking, . . . damages may be awarded if there is direct and consequential injury resulting from the public improvement, especially when that injury complained of applies to one property as opposed to that suffered from the whole community." *Holloway Citizens Comm of Lapeer & Genesee Cos v Genesee Co*, 38 Mich App 317, 320; 196 NW2d 484 (1972). Hence, defendant's position that plaintiff cannot establish that defendant took an action directed at its property because plaintiff cannot show that defendant intended or acted deliberately to impact plaintiff's property is inconsistent with the principles articulated in *Hinojosa, supra, Heinrich, supra,* and *Holloway, supra.* To the contrary, a plaintiff is not required to allege or prove intent or deliberate affirmative action on the part of the government, but only that the government's abusive action was directed at the plaintiff's property.

In fact, plaintiff's first amended complaint alleges as follows:

> 22. Not only does rain and melting snow run off of the improperly designed roadway and driveway apron but the action of Defendant in flushing its fire hydrants cause the water and sludge to drain onto plaintiff's property.
>
> 23. It has been found that water traveling east on E. Marlette Street would and continues to divert from the curb and gutter in front of her driveway, run north on the concrete apron, down the driveway and under and into her home.

> 24. The increased elevation of the roadway and improper construction of the curb and gutter has caused and continues to cause storm water runoff and sludge to come in contact with her home and foundation.

Plaintiff alleges that the runoff is intermittent but inevitable. As a result of the flow of water and sludge, plaintiff alleges that black mold developed. Plaintiff further alleges that "the home must be destroyed due to the inability to completely clean and rid the home of the black mold." Thus, plaintiff specifically asserts physical injuries to her property as the direct and consequential result of an improperly designed and constructed roadway, particularly the curb and gutter. Accepting plaintiff's complaint as true, the injury alleged amounts to an appropriation of the land, not merely a consequential injury to the property resulting from improvement of the street. *Maiden, supra* at 119. As such, plaintiff has properly pleaded her complaint for an inverse condemnation action in accordance with the factors enunciated in *Hinojosa* and thus has created questions of fact for the trier of fact . *Hinojosa, supra* at 548-549. Namely, plaintiff has presented questions of fact regarding whether defendant "abused its legitimate powers" when it allegedly improperly designed or constructed the roadway, curb, and gutter on E. Marlette Street in front of plaintiff's home. *Id*. Further questions of fact exist concerning whether defendant's "affirmative action" of renovating the street and allegedly causing water and sludge runoff onto plaintiff's property was in fact "'directly aimed at . . . plaintiff's property'" as contemplated in *Hinojosa, supra* at 548-549 and *Heinrich, supra* at 700.

IV

In conclusion, plaintiff in an inverse condemnation action must show action directed at the plaintiff's property in order to establish the claim, but need not establish "intent" on the part of the government. Because plaintiff has alleged that her property is permanently subjected to intermittent but inevitable runoff caused by defendant's improvement of the street in front of her home, she has properly pleaded a taking by inverse condemnation in avoidance of governmental immunity. Accordingly, the trial court did not err in denying defendant's motion for summary disposition.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio